

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

**Petition of Wisconsin Public Service)
Corporation for Declaratory Ruling)
Regarding Right to Self-Supply Station)
Power to Fox Energy Center)**

Docket No. 6690-DR-109

INITIAL BRIEF OF WISCONSIN PUBLIC SERVICE CORPORATION

BACKGROUND

This dispute concerns Wisconsin Public Service Corporation's (WPSC) desire to self-supply station power to its Fox Energy Center (Facility), a 593 MW natural gas-fired combined-cycle electric generating unit located in the Village of Wrightstown, Wisconsin, and within the retail electric service territory of Kaukauna Utilities (KU). Station power is "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site." *PJM Interconnection, LLC*, 94 FERC ¶ 61,251, P 61,889 (2001).

Prior to March 2013, Fox Energy Center, LLC owned the Facility and purchased both station power and power for the Facility's water pumping station from KU. In March 2013, WPSC purchased Fox Energy Center, LLC, which was merged into WPSC upon closing and no longer exists. WPSC now owns and operates the Facility and, since April 2013, WPSC has purchased power from KU for the same purposes noted above. WPSC now seeks to self-supply station power to its Facility by "remote self-supply," which is when an owner of a generation facility supplies station power to that facility from affiliated off-site generation resources.

Calpine Corp. v. FERC, 702 F.3d 41, 42 (D.C. Cir. 2012).

WPSC has the right to self-supply the Facility's station power under both federal and state law. Schedule 20 of the Midcontinent Independent System Operator (MISO) FERC Electric Tariff (MISO Tariff) authorizes an owner of a generating unit to use the transmission grid to remotely self-supply station power to the unit with power from other affiliated generation resources. (*See* Exhibit 1 to WPSC's Petition) Moreover, Wisconsin law provides:

Nothing in this section shall preclude any public utility or any cooperative association from extending electric service to its own property or facilities or to another cooperative association for resale. Wis. Stat. § 196.495(3)

KU asserts that the parties' 2004 Territorial Agreement (the Agreement) (Exhibit 2 to WPSC's Petition) precludes WPSC from self-supplying station power to its Facility without KU's consent. Section 2 of the Agreement states that KU has the "exclusive right to provide electric utility service to customers located west of the Boundary line." Section 4 of the Agreement states that each party has "the right to continue to provide service to all its existing customers as of the effective date of this Agreement." Based on these terms, KU claims that it has the exclusive right to serve WPSC's Facility because it is located in KU's service territory, and because it was a retail electric customer at the time the parties executed the Agreement. KU has also stated that, by entering into the Agreement, both parties waived their statutory right to self-supply station power to generation facilities located in a co-party's service territory.

WPSC has petitioned the Commission for a declaratory ruling that WPSC has the right to remote self-supply station power to its Facility and that the Agreement does not interfere with that right.

SUMMARY OF ARGUMENT

WPSC requests that the Commission find that it is entitled under the MISO Tariff and Wis. Stat. § 196.495(3) to remote self-supply station power at its Facility, and that the

Agreement does not interfere with that right. For several reasons, the Agreement does not preclude either party from self-supplying station power to generation facilities that they own and that are located in the other party's service territory. First, both the MISO Tariff and Wisconsin law recognize that utilities may self-supply station power to generation units that they own, regardless of the location of those units. Second, the parties did not waive this right when they executed the Agreement. Canons of contract interpretation, as well as state and federal law, preclude the Commission from reading into the Agreement a provision that prohibits WPSC from self-supplying station power to its Facility. To the contrary, the contract expressly reserves the parties' respective self-service rights. Third KU's reading of the Agreement would lead to a number of absurd results. For one, under KU's interpretation the prior owner of the Facility could have self-supplied station power, but WPSC is prohibited from doing so now that it owns the Facility. The Commission should not read the Agreement to create such an absurd result. WPSC did not acquire the Facility until almost a decade after it executed the Agreement with KU. Given the fact that the Agreement is completely silent as to the parties' respective rights to self-supply station power, it is simply untenable to argue that, at the time of contracting, the parties foresaw the WPSC-Fox Energy acquisition and intended to preclude WPSC from self-supplying station power to the Facility. Finally, it would be inequitable to prohibit WPSC from self-supplying station power to its Facility. The Facility is not served by any KU distribution facilities and WPSC's self-supply would save WPSC's customers approximately \$775,000 a year, while the financial and rate impacts to KU and its customers from the loss of revenue from WPSC would be small.

ARGUMENT

I. THE COMMISSION SHOULD FIND THAT WPSC IS ENTITLED TO SELF-SUPPLY STATION POWER TO ITS FACILITY BECAUSE IT HAS A RIGHT TO DO SO UNDER FEDERAL AND STATE LAW AND THE AGREEMENT DOES NOT INTERFERE WITH THIS RIGHT.

A. The MISO Tariff and Wisconsin law grant WPSC the right to self-supply station power to its Facility.

It is common practice for the owner of a generating unit interconnected to a regional transmission system to remotely self-supply station power for that unit from other generation resources that the owner owns or controls. For example, Wisconsin Electric Power Company (WEPCo) remotely self-supplies its 50 MW Rothschild biomass-fired generating facility, which is located in WPSC's service territory.

Both the MISO Tariff and Wisconsin law explicitly authorize this practice. Schedule 20 of the MISO Tariff states that a generation owner "may obtain Station Power for its Facility through any of the following sources: a) from the same Facility (i.e., On-Site Self-Supply); b) from a remote Facility owned by the same entity that owns such a Facility (i.e., Remote Self-Supply)." (Exhibit 1 to WPSC's Petition) Wisconsin law likewise authorizes public utilities to extend electric service to their own properties or facilities. *See* Wis. Stat. § 196.495(3). Accordingly, WPSC has the right—under both the applicable MISO tariff and state law—to self-supply station power to the Facility.

Moreover, the plain terms of the Wisconsin statute indicate that a utility has this right irrespective of whether it has entered into a Commission-approved territorial agreement. The same section of the public utility code that authorizes utilities to enter into territorial agreements also authorizes them to self-supply station power. The statute states that the express purpose of territorial agreements is to "avoid duplication of facilities." *See* Wis. Stat. § 196.495(4). By contrast, the statute does not similarly constrain a utility's right to self-supply

station power. In fact, the plain terms of the statute state that “[n]othing in this section shall preclude any public utility . . . from extending electric service to its own property or facilities....” Wis. Stat. § 196.495(3) (emphasis added). The fact that a utility enters into a territorial agreement does not, in and of itself, restrict a utility’s right to self-serve its own facilities, even if they are located in a co-party’s service territory.

Indeed, the utility’s right of self-service under Chapter 196 may not be contracted away. “Where a statutorily created private right serves a public policy purpose, the persons or entities protected by the statute cannot waive the right.” *Faust v. Ladysmith-Hawkins School Systems, Joint Dist. No. 1*, 88 Wis. 2d 525, 533, 277 N.W.2d 303, 306 (citations omitted), *on rehearing*, 88 Wis. 2d 525, 281 N.W.2d 611 (1979) (per curiam). The overriding purpose of the public utility code is to protect the consuming public. *See Barron Elec. Coop. v. Pub. Serv. Comm’n of Wis.*, 212 Wis. 2d 752, 772–73, 569 N.W.2d 726, 736 (Ct. App. 1997) (citing *Adams-Marquette Elec. Coop. v. Pub. Serv. Comm’n of Wis.*, 51 Wis. 2d 718, 742, 188 N.W.2d 515, 527 (1971)). Granting a utility the right to self-supply electric services to its own facilities protects the utility’s customers. Rather than paying another utility for electric service at that utility’s prevailing retail rate, the utility can instead use its own resources to self-serve its facilities at a lower cost to its customers. A utility cannot waive its statutory right to self-service, as this would subvert a fundamental goal of Wisconsin public utility law—namely, the protection of ratepayers. Therefore, even if WPSC had purported to waive its self-service right in that Agreement (which it did not), the waiver would be void as a matter of law.

B. The Agreement does not waive WPSC’s right to self-supply station power to its Facility, and in fact, it expressly preserves that right.

The Agreement does not waive either party’s right to self-service. To the contrary, the Agreement expressly reserves the parties’ right to self-supply station power. Section 10 of

the Agreement, which is labeled “Retention of Rights,” states, “Except as specifically set forth herein, this Agreement does not modify or limit the legal rights of either party KU and WPSC may exercise all rights not inconsistent with this Agreement.” (Exhibit 2 to WPSC’s Petition, at 3) In other words, the Agreement explicitly preserves the parties’ legal rights, unless there is specific language that provides otherwise. The plain language of the Agreement does not specifically waive or otherwise limit either party’s right to self-service under Wis. Stat. § 196.495(3). Accordingly, Section 10 of the Agreement explicitly reserves the parties’ right to self-service.

Moreover, WPSC’s decision to exercise that right would not be inconsistent with the Agreement. The purpose of a territorial agreement is to avoid the duplication of facilities, and to that end, utilities may contract with one another for “the right to serve customers.” Wis. Stat. § 196.495(4) (emphasis added). A customer is a person who receives electric service, is billed for that service and pays the bill. *See Wisconsin Power and Light Company’s Complaint Against the City of Wisconsin Dells*, Docket 6680-DR-110 (June 6, 2007) (municipal sewer and water utilities were customers of municipal electric utility for purposes of extension rules), *aff’d*, *Wisconsin Power and Light Co. v. Public Service Comm’n of Wis.*, 2009 WI App 164, 322 Wis. 2d 501, 777 N.W.2d 106, 114 (2009).¹ In this case, when WPSC self-supplies station power to

¹ *See also* Wis. Stat. §§ 77.522(4) (customer is “a person who enters into a contract with a seller of telecommunications services or, in any transaction for which the end user is not the person who entered into a contract with the seller of telecommunications services, the end user of the telecommunications services”); 100.525(1)(am) (customer is “a person who purchases telephone service”); 196.374(1)(c) (a “customer application of renewable resources” means “the generation of energy from renewable resources that takes place on the premises of a customer of an energy utility or municipal utility or a member of a retail electric cooperative”); Wis. Admin. Code §§ PSC 113.01(3) (customer is “the party billed for payment of bills issued for use of utility service at a given premises”); PSC 119.02(11) (customer is “any person who is receiving electric service from a public utility’s distribution system”); PSC 134.02(5) (customer is “the party billed for payment of bills issued for use of utility service to a premises”); PSC 165.02(10) (customer is “any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., provided with telecommunications service by any telecommunications utility”); PSC 179.02(2) (customer is “any person, firm, partnership, corporation, municipality, cooperative organization, telecommunications provider, governmental agency, or other entity which is provided with retail or wholesale telecommunications service, or both, by a party to an interconnection agreement”); PSC

its Facility, WPSC will not be providing electric service to any customer, but instead will be serving itself.² Indeed, the Facility is not and never has been a “customer” of KU. Rather, Fox Energy Center, LLC—the previous owner of the Facility—was KU’s customer. Likewise, now that WPSC owns the Facility, WPSC is KU’s customer. WPSC contracts with KU for retail electric service to the Facility under KU’s tariff, KU provides the service and bills WPSC, and WPSC pays the bill.

Contrary to KU’s interpretation, customers are persons or entities, not inanimate objects. Under any common sense understanding of the concept of “customer,” one person or entity must purchase something from another person or entity. That does not occur when a generator self-supplies station power. “Because a self-supplying generator is not using another’s generating facilities, it is not causing another to incur costs associated with the usage of the other’s generating resources that would warrant a form of consideration. In other words, there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purposes of self-supply and accounting for such usage through the practice of netting.” *PJM Interconnection, LLC*, 94 FERC ¶ 61,251, at p. 61,890 (2001).

Even if Section 10 of the Agreement does not reserve the parties’ right to self-service, the Agreement still does not waive that right. A primary goal of contract interpretation is to “ascertain the true intentions of the parties as expressed in the contractual language.” *See Town Bank v. City Real Estate Dev.*, 2010 WI 134 ¶ 12, 330 Wis. 2d 340, 356, 793 N.W.2d 476,

185.12(6) (customer is “any person, owner, occupant, firm, partnership, corporation, municipality, cooperative organization, governmental agency, political entity, etc., provided with water service by any water public utility and is the party billed for payment of bills issued for use of utility service at a given premises”).

² Moreover, unlike the municipal electric utility in Docket 6680-DR-110, WPSC will not bill or pay itself for the self-service. Under the MISO tariff, station power taken from the transmission grid is netted against the generation owner’s sales into the grid. (Exhibit 1 to WPSC’s Petition, at § II.2 & II.3) If and to the extent that the generation owner self-supplies station power by remote self-supply, the generation owner pays a non-firm point-to-point transmission service charge “for the transmission of Energy in an amount equal to the Facility’s negative Net Output from Generation Owner’s Facility(ies) having positive Net Output.” *Id.* at § III.1.

484 (2010). In particular, a contractual waiver of a statutory right must be “clear and unambiguous.” *Faust*, 88 Wis. 2d at 532–33; *see also State v. Lewis*, 2004 WI App 2011 ¶ 14, 277 Wis. 2d 446, 455, 690 N.W.2d 668, 672 (2004) (“Waiver of a statutory right must be an intentional and voluntary relinquishment of a known right, and must be accomplished by a clear and specific renunciation of that right.”).

In this case, the language of the Agreement simply does not address—let alone establish a waiver of—the parties’ right to self-service under Wis. Stat. § 196.495(3) or the MISO Tariff. KU has pointed to Sections 2 and 4 of the Agreement. Section 2 grants each party the exclusive right to provide electric service to customers on its respective side of the boundary line, and Section 4 gives each party the right to continue providing service to all its existing customers as of the date of the Agreement. (Exhibit 2 to WPSC’s Petition, at 1–2). These provisions simply do not contemplate the parties’ rights of self-service, which by definition does not involve a customer, but rather a utility’s own facilities. Therefore, neither provision can be construed as a “clear and specific renunciation” of each party’s statutory right to self-supply station power to a generating unit located in the other party’s service territory. Although such a waiver provision may be advantageous to KU now that WPSC is in a position to self-serve the Facility, the Commission cannot read this provision into the Agreement when it clearly does not exist. *See Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38 ¶ 12, 261 Wis. 2d 70, 85, 661 N.W.2d 776, 783 (2003) (courts cannot “insert what has been omitted or rewrite a contract made by the parties”).

Of course, given the position the parties were in at the time of contracting in 2004, it is no surprise that the Agreement does not address their right to self-service. At that time, WPSC did not own the Facility (or any other generating facility in KU’s territory) and had

no intention of providing service to the then-owner of the Facility. The parties could not have foreseen that WPSC would acquire the Facility, and therefore, there was no reason for the parties to address self-service in the Agreement.

In sum, Section 10 of the Agreement expressly reserves WPSC's right to self-supply station power to the Facility. The Agreement does not contain specific language waiving WPSC's right to self-service, and the Commission cannot read such a provision into the Agreement.

C. The Commission cannot interpret the Agreement in a manner that restricts WPSC's right to self-supply under the Schedule 20 of the MISO tariff.

The logical extension of KU's position is that the parties intended the Agreement to waive a right secured to both utilities not only by state law, but also by FERC and MISO under the Federal Power Act. KU is trying to apply the Agreement in a way that was never contemplated by the parties at the time of contracting. The fundamental purpose of a territorial agreement (which is a creature of Wisconsin law) is to assign retail customers to each utility to "avoid the duplication of facilities." In other words, the Agreement is fundamentally concerned with the provision of retail electric service. It was not intended to address—let alone waive—the parties' federal right to self-serve their own generating units.

In any event, Federal law preempts the Commission from interpreting the Agreement in a manner that would restrict WPSC's right under Schedule 20 of the MISO Tariff to transmit electricity in interstate commerce to self-supply station power to the Facility. The Federal Power Act grants FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The MISO Tariff provides WPSC the right to use the regional transmission system to remote self-supply its generating units from other generating units it owns. The

Commission cannot interpret the Agreement in a manner that would abrogate WPSC's right to self-serve the Facility, as that would intrude upon FERC's exclusive jurisdiction over matters related to the transmission of electric energy in interstate commerce.

The D.C. Circuit has recognized that transactions involving certain types of station power do not fit within the scope of FERC's jurisdiction. Namely, third-party provision of station power generally involves a local utility selling power to an independent generator. This is a retail sale of electricity and is not subject to FERC jurisdiction. The self-supply of station power (remote or on-site) involves no sale whatsoever, and therefore could not fall within FERC's wholesale jurisdiction. Accordingly, "no means of procuring station power could plausibly be construed as a sale for end use subject to FERC's wholesale jurisdiction." *Calpine Corp. v. FERC*, 702 F.3d 41, 47 (D.C. Cir. 2012) (*Calpine*) (citing *PJM Interconnection, LLC*, 94 FERC ¶ 61,251, at 61,891).

However, *Calpine* only addresses the extent to which station power falls within FERC's wholesale jurisdiction—not its jurisdiction over interstate transmission. As FERC itself has noted, the remote self-supply of station power "may involve the unbundled retail transmission of electric energy in interstate commerce, which is subject to our jurisdiction." *PJM Interconnection, LLC*, 94 FERC ¶ 61,251, at 61,891 n.60. As discussed above, WPSC will utilize the interstate transmission system operated by MISO to remote self-supply the Facility, and it will pay MISO for the transmission service that facilitates such self-supply. Accordingly, the remote self-supply of station power to the Facility falls within FERC's exclusive jurisdiction. *See New York v. FERC*, 535 U.S. 1, 20 (2002) ("It is true that FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market. However, FERC's jurisdiction

over electricity *transmission* contains no such limitation.”). The Commission cannot take action to deprive WPSC of this federally-guaranteed right.

D. The Commission should not adopt KU’s interpretation of the Agreement because it would lead to unreasonable and absurd results.

If the Commission determines that the Agreement is ambiguous, it still must interpret the Agreement in a manner that “avoid[s] absurd results.” *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127 ¶ 2, 351 Wis. 2d 123, 127–28, 839 N.W.2d 425, 427 (2013); *see also Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979) (ambiguous contracts should be interpreted to “result in a reasonable, fair and just contract as opposed to one that is unusual or extraordinary.”)

Adopting KU’s interpretation of the Agreement would lead to a number of absurd results. First, under KU’s interpretation, nothing would have stopped Fox Energy Center, LLC from remote self-supplying station power when it owned the Facility because it did not have a territorial agreement with KU. But, according to KU, WPSC is prohibited from doing so now that it owns the Facility. The right to remote self-supply station power to the facility should not depend on the identity of its owner. Second, if KU’s interpretation is taken to its logical extreme, and the Facility is KU’s customer, then WPSC would be prohibited from self-serving station power to its Facility from the Facility itself. Such a conclusion would require the rewiring of the Facility to isolate its generating capacity from its station power requirements. Finally, if KU is right, then a utility that enters into a territorial agreement with a neighboring utility could not self-supply any generating unit located in its neighbor’s service territory because that generating unit would be considered a “customer” within the meaning of the territorial agreement. Thus, if KU is right, then WEPCo would not have the right to remote self-supply its

Rothschild biomass plant because the territorial agreement between WEPCo and WPSC for Waupaca County gives WPSC the exclusive right to serve electric retail customers in Rothschild.

E. The Commission should not adopt KU's interpretation of the Agreement because it would lead to an inequitable result.

The Commission should not prohibit WPSC from remotely self-supplying the Facility because doing so would inappropriately subsidize KU's customers at the expense of WPSC's customers. Although KU currently provides station power to WPSC's Facility, no KU distribution facilities are used to provide such service. WPSC's Facility is directly interconnected to the ATC transmission system and KU does not even own the meters used to measure its station power service. Thus, to the extent that WPSC is compensating KU for any of its fixed costs, WPSC's customers are subsidizing KU's customers.

Furthermore, by remotely self-supplying the Facility, WPSC will reduce its costs by about \$775,000 a year. (Exhibit 4, attached to Stipulated Facts) As KU's own "loss of load" study (Exhibit 3, attached to Stipulated Facts) shows, the loss of WPSC's revenues for Facility station power would result in small financial or rate impacts to KU or its customers, respectively.

CONCLUSION

For the foregoing reasons, WPSC respectfully requests that this Commission find that is entitled under Schedule 20 of the tariff of Midcontinent Independent System Operator, Inc. (MISO) and Wis. Stat. § 196.495(3) to self-supply station power at its Fox Energy Center in Wrightstown, Wisconsin.

Dated this 21st day of May, 2014.

Respectfully submitted,

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